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NO. 86-1210

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1986

HARLLEL B. JONES,
Petitioner,
vs.
ROBERT SHANKLAND, et al.,
Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

Page

Table of Authorities ii

Statement of the Case 1

Argument 3

I. A claim sounding in malicious prosecution for relief under 42 U.S.C. § 1983 accrues upon the granting of an unconditional grant of habeas corpus. .. 3

TABLE OF AUTHORITIES

Cases

Page

Bruce v. Estelle, 707 F.2d 155 (5th Cir.), **cert. den.**, 104 S.Ct. 400 (1983) 1

Gardner v. Forister, 472 F. Supp. 1 (W.D. N.C. 1979) 1

Lashley v. Missouri, ___ U.S. ___, 55 L.W. 3641 (1987) 1

Levering v. National Bank of Morrow County, 87 Ohio St. 117 (1912) 3,4,5

Other Authorities

42 U.S.C. § 1983 3

Rules of the Supreme Court of the United States, Rule 17.1 5

STATEMENT OF THE CASE

Though the parties appear to be in substantial agreement with respect to the procedural history of the case, there is one significant matter upon which there is dispute. Respondents Shankland and Fuerst label Chief Judge Battisti's February 10, 1977, order as "self-executing" (Brief of Shankland and Fuerst in Opposition, p. 3).

It was in fact only executory. This is borne out by the language of the order itself; a comparison with the language of orders of this Court that are, in fact, self-executing, **e.g., Lashley v. Missouri**, ___ U.S. ___, 55 L.W. 3641 (1987) (Blackmun, Circuit Justice); the contingent nature of such orders, **e.g., Gardner v. Forister**, 472 F. Supp. 1 (W.D. N.C. 1979), **Bruce v. Estelle**, 707 F.2d 155 (5th Cir.), **cert. den.** 104 S.Ct. 400 (1983); and the fact that, in actuality,

Mr. Jones was not released from the restrictions of bail and the writ was not made unconditional until Judge Battisti's subsequent Order of February 12, 1979.

I.

A claim sounding in malicious prosecution for relief under 42 U.S.C. § 1983 accrues upon the granting of an unconditional grant of habeas corpus.

Respondents Shankland and Fuerst argue that any claims of Mr. Jones that may be analogous to malicious prosecution arose sometime between February 10, 1977, when the District Court granted Mr. Jones' petition, and October 2, 1978, when this Court denied the State's petition for writ of certiorari. That argument is based upon **Levering v. National Bank of Morrow County**, 87 Ohio St. 117 (1912).

However, in making that argument, the Respondents ignore the holding of **Levering** which specifically holds that the cause of action does not arise until the case has been terminated in the court in which the first suit arose in favor of the civil plaintiff. A quotation in the

Brief of the City Defendants from **Levering** on page 17 indicates that the right to sue for malicious prosecution:

> ". . . **accrues upon the rendition in the trial court of a judgment for the defendant in the action complained of**, and is barred by the statute of limitations as not brought within one year after such judgment, although a proceeding in error may have intervened . . . ."

In their brief the bolded portion that appears above is not emphasized and the latter portion starting with "is barred" is emphasized. However, by focusing upon the former portion of their own quotation, one can see that a cause of action for malicious prosecution does not arise until a judgment is received in the initial court.

The Federal Respondents suggest that since it is admitted that this issue is one of first impression and since there is no demonstrated conflict among the

Federal Circuits, this case does not merit review. In so arguing, the Federal Respondents ignore the fact that Rule 17.1(c) of the Rules of this Court specifically provide that important cases of first impression are cases which may merit review by this Court. Further, the Federal Respondents ignore the fact that the decision of the Sixth Circuit below upon this issue conflicts with that of the Ohio Supreme Court in **Levering v. National Bank of Morrow County**, 87 Ohio St. 117 (1912). This, too, is a basis for granting review. **See** Supreme Court Rule 17.1(a).

Respectfully submitted,

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